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No. 1277

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

WILLIAM DADDANO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

	PAGE
Judgment and opinion of the court below	1
Jurisdictional statement	2
Questions presented for review	2
Statement of case	3
The indictment	3
Statement of facts	5
Reasons for Granting the Writ	6
1. A tremendous spate of prejudicial publicity invaded the community via the news media, the television and radio, such as to deprive petitioner of his right to a fair trial. Under such circumstances, the trial court should have inquired of the jurors, as repeatedly requested by the defense, whether any offending material came to their attention. The trial court's refusal in so doing violated the procedure set out by this court and by different panels of judges in the Seventh Circuit itself	6
2. Certiorari should be granted to determine whether all panels of judges of the Seventh Circuit should follow this court's decisions on the extent of permissible cross examination, or whether different panels may ignore other holdings by the Seventh Circuit judges which follow this court's rulings	12
3. The imposition of consecutive sentences for the same offense is double jeopardy	15

PAGE

4. Petitioner Daddano was misjoined with defendants named in Count 2 in violation of Rule 8(b), F.R.Cr.P. 18

Conclusion 19

Appendix—

A—Opinion of the Court of Appeals for the Seventh Circuit, October 1, 1970 .....App. 1

B—Order denying rehearing .....App. 21

AUTHORITIES CITED

Cases

Alford v. United States, 282 U.S. 687 (1931) 13

Ashe v. Swenson, 397 U.S. 436 (1970) 18

Blockburger v. United States, 284 U.S. 299, 304 (1932) 15, 17

Davenport v. United States, 353 F.2d 882 (D.C. Cir. 1965) 16

Evans v. United States, 232 F.2d 379 (D.C. Cir. 1956) 16

Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1968) 16

Garafolo v. United States, 390 U.S. 144 (1968) 13, 14

Gordon v. United States, 344 U.S. 414 (1952) 13

Gore v. United States, 357 U.S. 386, 2 L.Ed.2d 1405 (1958) 17

Harlow v. United States, 301 F.2d 361, 375 (5 Cir. 1962) 18

Heflin v. United States, 358 U.S. 415, 3 L.Ed.2d 407, 79 S.Ct. 451 (1959) 17

Ingram v. United States, 353 F.2d 872 (D.C. Cir., 1965) 17

Ladner v. United States, 358 U.S. 169, 3 L.Ed.2d 199 (1958) 17

PAGE

Marshall v. United States, 360 U.S. 310 (1959) 10

Newman v. United States, 212 F.2d 450 (6 Cir. 1954) .. 17

Pointer v. Texas, 380 U.S. 400, 404 (1965) 15

Prince v. United States, 352 U.S. 322, 1 L.Ed.2d 370, 77 S.Ct. 403 (1957) 17

United States v. Accardo, 298 F.2d 133, 136 10

United States v. Bukowski (7th Cir., No. 17378, decided September 15, 1970) 12

United States v. Barnett, 407 F.2d 1114 (6 Cir. 1969) .. 18

United States v. D'Argento, 373 F.2d 307 (7 Cir., 1967) 12

United States v. Hoffa, 367 F.2d 698 (7th Cir. 1966) 12

United States v. Noble, 155 F.2d 315, 318 (3 Cir. 1946) 17

United States v. Palermo, 410 F.2d 468, 471 (1969) 7, 10, 15

United States v. Varelli, 407 F.2d 735 (1969) 14

Schaffer v. United States, 362 U.S. 511 (1960) 19

Shaw v. Illinois, 394 U.S. 214 (1969) 13

Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) 11

Silverthorne v. United States, 400 F. 2d 627, 641 (9th Cir. 1968) 12

Smith v. Illinois, 390 U.S. 129 (1968) 13

Smith v. United States, 418 F.2d 1120 (D.C. Cir., 1969) 16

Whalen v. United States, 367 F.2d 468 (5 Cir. 1966) .. 18

Miscellaneous

Fifth Amendment to the United States Constitution .. 15

Rule 8(b) F.R.Cr.P. 18

In the
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WILLIAM DADDANO,

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vs.

THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice And Associate Justices of the Supreme Court of the United States:

William Daddano, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Judgment and Opinion of the court below.

On October 1, 1970, the Court of Appeals for the Seventh Circuit affirmed the judgment of conviction in the District Court, and on December 2, 1970, a timely petition for re-

hearing was denied. The opinion is not yet reported, but is appended hereto as Appendix A. The order denying rehearing is appended hereto as Appendix B.

Jurisdictional statement

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions presented for review

1. Whether the trial court's refusal to inquire of the jurors whether or not they had read or heard any of the considerable prejudicial publicity about the case during the course of the trial deprived defendant of his right to a fair trial? Whether it is sufficient for a trial judge merely to admonish jurors each night, before adjournment, not to read newspapers or listen to broadcasts where a spate of prejudicial publicity inundates the metropolitan press, television, and radio, without inquiring from the jurors upon resumption of the trial whether they followed the judge's admonitions, or whether any offending publicity came to their attention?

2. Whether equal justice under the law to defendants similarly situated requires the grant of this petition where the rule to poll the jurors with respect to the treatment of prejudicial publicity was violated by the panel of judges deciding the instant case and where several panels of judges within the Seventh Circuit have ruled differently in *United States* v. *Accardo,* 298 F.2d 133, 136 (1962) and in *United States* v. *Palermo,* 410 F.2d 468 (1969) and where the controlling decisions of this court in *Marshall* v. *United States,* 360 U.S. 310 (1959) and *Sheppard* v. *Maxwell,* 360 U.S. 333 (1959) were ignored?

3. Whether the extreme limitations of cross examination of the three chief government witnesses deprived the petitioner of his right to a fair trial in accordance with *Alford* v. *United States,* 282 U.S. 687 (1931), *Smith* v. *Illinois,* 390 U.S. 129 (1968) and *Garafolo* v. *United States,* 390 U.S. 144 (1968)? And whether petitioner received equal treatment and equal justice under the law where different panels of judges in the Seventh Circuit have followed the *Alford* and *Smith* cases (in *United States* v. *Varelli,* 407 F.2d 735 (1969) and in *United States* v. *Palermo,* 410 F.2d 468 (1969), but where the reviewing panel in the case at bar blithley ignored or refused to follow the holdings by this court and by its brother panels?

4. Whether it was not a violation of the double jeopardy clause of the Fifth Amendment to the Constitution to impose consecutive sentences for the same offenses?

5. Whether there was a misjoinder of defendants and of counts in violation of Rule 8(b) of F.R.Cr.P.?

Statement of case

The Indictment

Petitioner William Daddano, together with Richard Cain and Rocco Montagna, was charged in Count 1 with conspiring to violate 18 U.S.C. 4 (misprision of a felony), it being alleged that the defendants, having knowledge of the commission of a bank robbery occurring on September 23, 1963, conspired to "conceal said bank robbery and the perpetrators thereof and to not as soon as possible make known the same to some judge or other person in civil authority under the United States, by attempting to determine from various persons, through the administration of polygraph examinations, commonly referred to as lie detector tests, and by various other means, whether certain

persons were furnishing information concerning the aforesaid bank robbery and the perpetrators thereof to governmental authorities lawfully investigating the same."

Paragraph 2 of the conspiracy count charged that it was a part of the aforementioned conspiracy that the defendants, knowing of the aforementioned robbery, violated 18 U.S.C. 3 by being accessories after the fact to the said bank robbery in that they did "receive, relieve, comfort and assist" (the robbers) by giving lie detector tests to determine whether certain persons were furnishing information concerning the bank robbery and the perpetrators thereof to governmental authorities, lawfully investigating the same, in order to hinder, and prevent the apprehension, trial and punishment of the robbers.

Count 3 charged these defendants with being accessories after the fact to the bank robbery in violation of 18 U.S.C. 3. They were charged with being such accessories after the fact to the bank robbery by "administering and causing to be administered polygraph examinations, commonly referred to as lie detector tests, and by other means, in order to determine whether certain persons were furnishing information concerning the aforesaid bank robbery and the perpetrators thereof to governmental authorities, lawfully investigating the same, in order to hinder and prevent the apprehension, trial and punishment of the aforesaid offenders for the aforesaid bank robbery."

Count 4 charged the same defendants with misprision of a felony in violation of 18 U.S.C. 4 in that they, having knowledge of the commission of the bank robbery, concealed, and did not as soon as possible make known the same to some judge or other person in civil authority under the United States. The means of committing this offense

are alleged to be the giving of the same polygraph examinations set forth in Counts 1 and 3. (C 2-10).[1]

In a separate count 2, Frank DeLegge, Sr. and Frank DeLegge, Jr. were charged with bank robbery in violation of 18 U.S.C. 2 113(a)(d). (C 7-8).

Daddano's motion for severance was denied. (C 70-72). Motions for continuance based on prejudicial publicity and a motion to sequester the jury during trial were denied. (R. 6-12).[2]

All defendants were found guilty on all counts. Daddano was sentenced to 5 years on Count 1, 7 years on Count 3, and 3 years on Count 4, the sentences to run consecutively for a total of fifteen years, together with a total fine of $13,000 on the three counts, and the costs of prosecution. (C 830).[3]

Statement of Facts

The Statement of Facts are sufficiently set out in the Opinion of the court below at Appendix A, pp. 2-5. Additional facts necessary for the consideration of each separate point will be included therein.

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[1] The references to "C" are to the Common-Law Record.

[2] References to "R" are to Transcript of Record of trial proceedings.

[3] Other defendants were sentenced as follows: Montagna, 3 years on each of the three counts to run concurrently and a fine of $13,000; Cain, a sentence of 4 years each on Counts 1 and 3 and 3 years on Count 4, the sentences to run concurrently, together with a fine of $13,000; Frank DeLegge, Sr., a sentence of 15 years on Count 2 and a fine of $5,000; and, Frank DeLegge, Jr., a sentence of 7 years and a fine of $5,000.

Reasons for Granting the Writ

1.

A tremendous spate of prejudicial publicity invaded the community via the news media, the television and radio, such as to deprive petitioner of his right to a fair trial. Under such circumstances, the trial court should have inquired of the jurors, as repeatedly requested by the defense, whether any offending material came to their attention. The trial court's refusal in so doing violated the procedure set out by this court and by different panels of judges in the Seventh Circuit itself.

The sensational nature of the trial is evidenced by the mere samples of prejudicial news stories.[4]

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[4] "The government charges that he [Cain] lent a sheriff's office lie detector to William (Willie Potatoes) Daddano, 55 a syndicate gangster." *Chicago Sun-Times*, September 14, 1968 (C 666).

"Atty. George B. Callaghan representing William (Willie Potatoes) syndicate chieftain . . ." *Chicago Daily News*, September 13, 1968 (C 672).

"The government charges that Cain loaned Sheriff Ogilvie's polygraph equipment to William (Willie Potatoes) Daddano, 55, a crime syndicate gangster and others, for the underworld's, stool pigeon hunt." *Chicago Sun-Times*, September 16, 1968 (C 684).

"The waiting man, according to the witness, was William (Willie Potatoes) Daddano, 55, truck hijacker and versatile handyman for the crime syndicate." *Chicago Sun-Times*, September 17, 1968 (C 688).

* * *

"Daddano, 55, truck hijacker and reportedly syndicate boss for Kane County, looking for all the world like an elderly affluent grocer." *Chicago's American*, September 24, 1968 (C 723).

"Michael LaJoy, the government's star witness against Richard B. Cain *and four syndicate hoodlums*, told of undergoing lie tests

The Opinion below (App. A, p. 17) states that the holding in *United States* v. *Palermo*, 410 F.2d 468 (7 Cir.,

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to prove his loyalty to a robbery gang." (Emphasis added) *Chicago's American*, September 14, 1968 (C. 678).

* * *

"He [Cain] is accused of supervising lie detector tests to insure the loyalty of members of a *syndicate-controlled hijacking gang*." (Emphasis added) *Chicago's American*, September 12, 1968 (C. 660).

"A former deputy sheriff accused Richard Cain, 44, in court Tuesday of having supplied a lie detector machine used in a *crime syndicate hunt for a stool pigeon*. (Emphasis added) *Chicago's American*, September 25, 1968 (C. 725).

"*Crime syndicate leaders* then were trying to identify an informant they believed had talked to the FBI about a $43,000 Melrose Park bank robbery on Sept. 23, 1963." (Emphasis added) *Chicago Sun-Times*, September 27, 1968 (C. 783).

"And the DeLegges — Frank the son and Frank the father — *up from the underworld ranks of cartage thieves*, sitting side by side with their lawyer to the left of the court at their separate table, faces overlaid with tan, and careful eyes." (Emphasis added) *Chicago's American*, September 24, 1968 (C. 723).

"On trial for conspiracy with Cain are Daddano, Frank DeLegge, Sr., 50, *up through the underworld ranks from cartage thief;* his son, Frank Jr., 30, *a son-in-law of convicted extortionist Frank Palermo*, and Rocco (called Rocky or Schnibble Nose) Montagna, 52, a bail bondsman and political fixer." (Emphasis added) *Chicago Sun-Times*, September 16, 1968 (C. 684).

* * *

"*The prosecution contends* that one of the four men questioned, Guy [Lover Boy] Mendola, later was *killed by other gang members* because they believed he was lying when he answered 'no' to that question." (Emphasis added), *Chicago's American*, September 24, 1968 (C. 721).

"*Police said* they believe Mendola was *slain by other gang members*, probably to keep him from testifying against them." (Emphasis added) *Chicago Daily News*, September 12, 1968 (C. 663).

"*Police said* Mendola apparently was *slain by other gang members* who feared he had become a government informer. The slaying fol-

1969) reversing the same trial judge[5] for an identical failure to poll jurors to ascertain exposure to contaminating publicity was not applicable to the case at bar because

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lowed a series of *mob-ordered* lie detector tests of gang members in an attempt to find the informer." (Emphasis added), *Chicago Daily News*, September 17, 1968 (C. 705).

"*Federal investigators said* Mendola apparently *was slain by other members of the robbery gang* and that he apparently *failed* his lie test." (Emphasis added) *Chicago Daily News*, September 11, 1968 (C. 641)

"Charge 'Liar' Was Slain, *Chicago's American*, Headline, September 24, 1968 (C. 721).

"A fifth participant in the robbery was Guy Mendola, who was murdered, allegedly *because he had talked to federal agents about the crime.*" (Emphasis added) *Chicago's American*, September 12, 1968 (C. 661).

"Guy [Lover Boy] Mendola, 39, burglar and stick-up man who apparently had information on the bank robbery, was killed in a *gang style murder* by five shotgun blasts on Aug. 30, 1964." (Emphasis added) *Chicago Tribune*, September 13, 1968 (C. 659).

"One of the gang, Guy [Lover Boy] Moischano, was *murdered in gang fashion* after allegedly being revealed as a stool pigeon following a lie test in a Franklin Park motel." (Emphasis added) *Chicago's American*, September 12, 1968 (C. 660).

"Foran read portions of the June 10, 1967, report to the judge. 'It recites that the prisoner was having a very difficult time,' Foran read. 'He is afraid for his life. *The organization of Chicago has passed a death sentence on him.* He does not know why this was done, but he is fearful and apprehensive.'

"Seeks News Gag

"Atty. Raymond Smith, representing the DeLegges, then made a motion asking the judge to instruct reporters in the courtroom not to report what had happened so the jury could not learn what was said out of their presence." *Chicago Tribune*, September 18, 1968 (C. 702).

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[5] Hon. Julius J. Hoffman.

the *Palermo* stories appeared in headlines. But we set out below samples of *headlines* in this case.[6]

Whenever the offending articles appeared, the defense requested the court to inquire of the jurors whether they read newspaper publicity about the case or whether they heard anything on radio or television. Every motion was denied.

The Opinion below admitted the prejudicial nature of the offending articles, for (App. A, p. 15):

> "There can be no question but that if it were shown that a juror had read the items going beyond the record, particularly those referring to Mendola's death and those calling the defendants' gangsters and the like, *further inquiry with respect to their effect upon him would be required.*" (Emphasis added)

The grant of certiorari should be allowed under the supervisory powers of this court. In *Marshall* v. *United*

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[6] "Bank Robber Testifies on *Mob* Lie Test, *Hoods* Feared There Was Informer" (C. 659), "Convicted Robber Links Ex-Cop, *Mob* to Holdup" (C. 660), "Cain Trial Told of *Mob* Lie Test to Trap Squealer" (C. 661). "Charge *'Liar' Was Slain*" (C. 721), *"Protected* Witness Relates Bank Holdup Linked to Cain" (C. 662), "Witness Describes *Gang's* own Lie Test" (C. 678), "Testifies Ex-Deputy Gave Lie Tests On Orders of *Gangster* In Cain Case" (C. 688), "*Mobster* Tells Planning of Bank Holdup" (C. 701), "Cain Informer Charges Plot Against Life" (C. 702), "Anti-Cain Witness Charges Murder Attempts in Prison" (C. 703), "Convict Stuns Cain Trial with Murder Charge" (C. 704), "Prison plot to *Slay* Him, says Cain Trial Witness" (C. 706), "Cain Ordered Lie Tests for *Mob*, Ex-Deputy Says" (C. 723), "Ex-Deputy Accuses Cain of Ordering Lie Tests For Gang" (C. 725), "Put Hoods on Lie Box, Ex-Cop Says" (C. 728), "Gave Lie Test to Gang, Says Ex-Aid of Cain" (C. 729), "U.S. Denies Mendola Was a 'Stool Pigeon'" (C. 770), "Prosecutor Tells Cain Trial: There Was No Informer" (C. 772), "U. S. Attorney Denies Mendola Told Gangland Secrets" (C. 774), and "Trial Disclosure Mendola Not Bank 'Pigeon'" (C. 785).

States, 360 U.S. 310 (1959) this court reversed a conviction and remanded for a new trial because jurors admitted reading offending newspaper articles. But as a panel of judges of the Seventh Circuit observed, in reversing the conviction in *United States* v. *Palermo,* 410 F.2d 469, 471 (1969),

> "*Without questioning the jurors at all it is impossible to tell whether or not they have read or heard any prejudicial publicity.*" (Emphasis added)

We also point out that in the Seventh Circuit a defendant's fate less depends upon the rule of law than upon the particular panel deciding the case. Thus, the Seventh Circuit decided in 1962 in *United States* v. *Accardo,* 298 F.2d 133, 136, that the judge[7] should have "by the careful examination of each juror out of the presence of the others determined the effect of the articles on those who had read them and whether they had discussed the articles with others."

It is true that each case must rest on its special facts. *Marshall* v. *United States,* 360 U.S. 310 (1959). But the "special facts" here reflect the overwhelming prejudicial nature of the lurid newspaper articles.

Some of the stories appeared on the front page, others on inner pages with introductions in large headlines. Some were in several columns. Several editions carried pictures and sketches. Mendola's murder is mentioned more than 25 times because he was "stool pigeon" or "informer", but always because he flunked or failed to pass the lie tests.

Daddano is referred to repeatedly as a "mob boss", "crime syndicate chief", "crime syndicate figure", "syndicate gangster", "crime syndicate racket boss", "a professional thief", "a career thief", "a career hijacker", "a

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[7] Hon. Julius J. Hoffman.

truck hijacker". One story said: "Daddano who was acquitted of being the leader of the syndicate hijacking gang that planned and executed bank and supermarket robberies" (C. 660). Another story reported proceedings had out of the presence of the jury concerning alleged death threats made to witness D'Argento (C. 702). Another that Cain was under a charge of perjury for lying to a Grand Jury (C. 787). One told of evidence ruled out, but left on the record "for judges who might read it on appeal" (C. 808).

We ask the court to note that a number of pre-trial motions were made seeking delays in the trial until after the November, 1968 Illinois gubernatorial elections, because the Republican candidate (Richard Ogilvie) had been defendant Richard Cain's employer when he was Sheriff of Cook County, Illinois. This court had stated in *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966), that where there is a reasonable likelihood that publicity will prevent a fair trial, the case should be continued or transferred to another venue. This was called to the trial court's attention, but ignored.

Likewise ignored, were the defendants' motions for sequestration of the jury (A. 12).[8] Without government objection, the trial court refused to order a sequestration even though alerted to the possible dangers of jury contamination. Accordingly, the error was compounded when the judge deliberately refused even to inquire of the jurors whether they read or heard any of the prejudicial publicity.

The Opinion below suggests that when the trial judge refused to inquire of the jurors, that he did so "relying upon the presumption that the order [not to read news-

[8] "A" refers to printed Appendix of record, as filed in the Court of Appeals.

papers] had not been violated" (App. A, p. 14). But that is a hollow presumption. See *United States* v. *Bukowski* (7th Cir., No. 17378, decided September 15, 1970) where the court affirmed a jail sentence imposed by the trial judge[9] who held a juror in contempt of court for a "flagrant disregard" of his instructions in connection with trial publicity. And see *Silverthorne* v. *United States*, 400 F. 2d 627, 641 (9th Cir. 1968) where the jurors were found reading newspapers in the jury room; one juror even had a collection of all the newspaper articles pertaining to the trial, notwithstanding . . . the court's repetitive admonishments that the jurors should read or hear nothing about the case." And cf. *United States* v. *Hoffa*, 367 F.2d 698 (7th Cir. 1966) at 715 where a juror testified that another juror had shown him a newspaper article about the trial even though they were sequestered.

For the judge never once to have inquired of the jurors whether any publicity came to their attention does violation to even the most rudimentary fair trial concept.

2.

Certiorari should be granted to determine whether all panels of judges of the Seventh Circuit should follow this court's decisions on the extent of permissible cross examination, or whether different panels may ignore other holdings by the Seventh Circuit judges which follow this court's rulings.

Three tainted witnesses made the case for the government. Each of the witnesses—Schang, LaJoy and D'Argento—had been convicted of the bank robbery and had received sentences of 15 years,[10] and all were shown

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[9] Hon. Julius J. Hoffman.

[10] Their convictions had been affirmed, *United States* v. *D'Argento*, 373 F.2d 307 (7 Cir., 1967).

to have pending undisposed-of criminal cases in the district court, and all had committed other crimes for which they had not been indicted.

It was shown that D'Argento and LaJoy had been paid large sums of money by the FBI. They were peculiarly the character of witnesses requiring the exercise of the most extended freedom of the right of cross examination. *Gordon* v. *United States,* 344 U.S. 414 (1952).

Cross examination was limited in the extreme, in violation of the holdings by this court in *Alford* v. *United States,* 282 U.S. 687 (1931); *Smith* v. *Illinois,* 390 U.S. 129 (1968); *Garafolo* v. *United States,* 390 U.S. 144 (1968); and *Shaw* v. *Illinois,* 394 U.S. 214 (1969).

LaJoy was asked whether on June 19, 1968 he was involved in a jury bribery case in the district court (R. 462-3); whether he had procured perjured testimony on his behalf in his bank robbery trial (R. 464-5); *where he was living and with whom* (R. 602-4). The court sustained the government's objections to this series of questions.

Schang was asked whether he had suborned perjury in his own bank robbery trial (R. 1412-17; 1543-3). Objections were sustained to questions as to the nature of his present employment (R. 1416), his wages (R. 1428), *where he lived* and whether he lived in the Northern District of Illinois (R. 1433), whether he was living in Chicago or in Illinois (R. 1544-5). He had admitted to receiving a travel expense check from the government; when asked where he traveled, government objections were sustained (R. 1548).

As to D'Argento, the court limited cross examination in connection with a letter that D'Argento wrote while he was in jail complaining of coercion by government officials to obtain his cooperation. The letter complained of "undue harassment and cruel, discriminating unhuman

punishment" by various federal officials, yet all cross examination regarding the contents of the letter was cut off. (R. 995; 1152-3). During direct testimony, D'Argento stated there was a gun in the room where the lie detector tests took place. Efforts, on cross-examination, to show he did not say anything about a gun when he made a statement to FBI agent Green were fruitless. D'Argento was asked, "Where in that statement purportedly prepared by Thomas A. Green do you find any reference to a gun in connection with a lie detector test?" The government's objection was sustained. (R. 1190-91).

The holdings in *Alford* and *Smith, supra,* are unequivocal that prosecution witnesses may be placed in their proper setting in their community, first, by ascertaining their address. And this court reversed a Seventh Circuit court holding affirming the trial judge's ruling denying cross examination inquiry in *Garafolo* v. *United States,* 390 U.S. 144 (1968). *Garafolo* was reversed in the light of *Smith* v. *Illinois, supra,* for limitation of cross examination.

The author of the opinion in the instant case totally ignored the Seventh Circuit's holding in *United States* v. *Varelli,* 407 F.2d 735 (1969) which reversed, inter alia, for the specific limitation of cross-examination regarding Schang's having procured a false alibi for his bank robbery trial, the same bank robbery which is the subject matter of the case at bar and, of course, the same witness, Schang. But the limitation of cross-examination here is the more egregious, because La Joy, a witness here (as he was not in *Varelli*) also procured false alibi witnesses in his bank robbery trial. In *Varelli*, the panel stated, p. 751:

> "In essence, the claim is that Schang is either a perjurer or a suborner of perjury. Schang's credibility may be attacked by extrinsic evidence or by cross-examination . . . since perjury would be relevant to the

witnesses' veracity, cross-examination should be allowed on retrial."

Also, another panel of the Seventh Circuit in *United States* v. *Palermo,* 410 F.2d 468 (1969), cited *Varelli* as authority for reversing where the trial judge[11] refused to allow questions as to a witness' address and present employment ". . . since they are threshold questions of cross-examination." (p. 472).

It is inexplicable how the holdings of the Seventh Circuit in *Varelli* and *Palermo* can be reconciled with the holding in the instant case.

> "[T]he right of cross-examination is 'one of the safeguards essential to a fair trial'." *Pointer* v. *Texas,* 380 U.S. 400, 404 (1965).

This court's exercise of its supervisory powers is sought to clarify whether in the Seventh Circuit there is rule by law—or rule by adventitious selection of panel.

3.
The imposition of consecutive sentences for the same offense is double jeopardy.

The imposition of consecutive sentences for essentially the same conduct is a violation of the double jeopardy clause of the Constitution. The Fifth Amendment to the Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

Although consecutive penalties may be imposed for separate offenses, *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932), they must indeed be separate offenses.

Petitioner was sentenced to consecutive terms totalling 15 years (C. 830) on three charges, the gist of each being the giving or causing the giving of a lie detector test.

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[11] Hon. Julius J. Hoffman.

This is the single element upon which each count is predicated and upon which the judgment rests.

The incongruity of the sentence is apparent when we consider that the giving of the lie test is charged to have made the defendants parties to the crime of bank robbery (accessories after the fact); guilty of misprision of a felony for not reporting the crime to which the indictment says they had become parties, and guilty of conspiring to not report the thus charged participation in a crime.

The multiple sentences imposed for the single act of giving a lie detector test, no other fact being pleaded or proven in support of the three charges, are illegal and should be set aside.

Although the same act may at times constitute two offenses and justify findings of guilty on 2 counts and separate sentences thereon, those sentences must run concurrently. In *Fuller* v. *United States*, 407 F.2d 1199 (D.C. Cir. 1968), the court recognized the danger involved when it stated, p. 1224:

> "Obviously there is a need to be careful to prevent injustice when what is essentially a single course of conduct may be prosecuted as more than one offense, under more than one statutory provision. Such injustice is obviated by the rule prohibiting the imposition of consecutive sentences in appropriate cases, even when the defendant has committed two or more legally distinct offenses. . . ."

To similar effect: *Smith* v. *United States*, 418 F.2d 1120 (D.C. Cir., 1969), reversing the imposition of consecutive sentences. See also *Davenport* v. *United States*, 353 F.2d 882 (D.C. Cir. 1965); *Evans* v. *United States*, 232 F.2d 379 (D.C. Cir. 1956).

As the *Smith* case, *supra*, pointed out, consecutive sentences may be imposed when congressional intent is clear

that such result is desired. In *Ladner* v. *United States,* 358 U.S. 169, 3 L.Ed.2d 199 (1958), this Court reversed the imposition of consecutive sentences and said that they "are not interpreting federal criminal statutes so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended." (358 U.S. 178). When legislative intent is unclear "the court applies a policy of lenity and adopts the less harsh meaning." (358 U.S. 177). See also *Heflin* v. *United States,* 358 U.S. 415, 3 L.Ed.2d 407, 79 S.Ct. 451 (1959) (consecutive sentences for robbing a bank and possessing stolen money held improper); *Prince* v. *United States,* 352 U.S. 322, 1 L.Ed.2d 370, 77 S.Ct. 403 (1957) (consecutive sentences for entering a bank with intent to commit a felony and bank robbery held improper).

Gore v. *United States,* 357 U.S. 386, 2 L.Ed.2d 1405 (1958) held that Congress *intended* consecutive sentences to be imposed for offenses resulting from violation of narcotics laws.

In *Gore,* it was specifically found that "[b]oth in the unfolding of the sustained provisions of law and in the scale of punishments Congress has manifested an attitude not of lenity, but of severity, toward violations of the narcotics laws." (357 at 391). See *Blockburger* v. *United States,* 284 U.S. 299, 76 L.Ed. 306 (1932); *Ingram* v. *United States,* 353 F.2d 872 (D.C. Cir., 1965).

In *Newman* v. *United States,* 212 F.2d 450 (6 Cir. 1954) the court held, "If the same evidence will prove both of the alleged offenses, separate sentences cannot be imposed." (Citing cases) p. 452.

In *United States* v. *Noble,* 155 F.2d 315, 318 (3 Cir. 1946) the court concluded that "the same evidence which would support a conviction upon any one of the first four counts would also support a conviction on all of those counts and justified but one punishment."

In *Harlow* v. *United States*, 301 F.2d 361, 375 (5 Cir. 1962), in reversing a conviction on one count it was held that the offenses, though not "the same in name" were the same in fact. See also *Whalen* v. *United States*, 367 F.2d 468 (5 Cir. 1966), *United States* v. *Barnett*, 407 F.2d 1114 (6 Cir. 1969).

And cf. *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

Since it goes without question that petitioner here was found guilty of two crimes resulting from the same act, and proved by the same evidence (the giving of the lie tests) this court can only affirm the imposition of consecutive sentences if it finds that Congress so intended. And no such determination was made below.

4.

Petitioner Daddano was misjoined with defendants named in Count 2 in violation of Rule 8(b), F.R.Cr.P.

Defendants Daddano, Montagno and Cain were named in Count 1, the conspiracy count, Count 3 (accessory after the fact) and Count 4 (misprision of felony). Count 2 charged that Frank DeLegge, Sr. and Frank DeLegge, Jr., committed robbery of a bank that was federally insured. (C 6).

Prior to trial Daddano moved for a severance from the DeLegges. (C 70). Rule 8(b) F.R.Cr.P. only permits joinder of defendants if they are alleged to have participated in (1) the same act or transaction or (2), the same series of acts or transactions constituting an offense.

Although, under the government's theory it may have been necessary to prove the knowledge of the bank robbery, it was unnecessary, even under its theory, to show all of the participatory details of all of the alleged bank robbers. The testimony and evidence submitted by the government against the DeLegges, including the armed threats in the bank, in support of Count 2 were permitted to be con-

sidered by the jury against the defendant, Daddano, for the judge ruled that all the evidence and all the exhibits should be considered by the jury against all of the defendants (R. 1851), even though the DeLegges were not defendants in the conspiracy charge, and the robbery was not charged as an object of the conspiracy.

It cannot in good faith be argued by the government that the joinder of Count 2 charging the bank robbery was justified. That the defendants named in Counts 1, 3 and 4 "had knowledge" that the bank had been robbed was all the government was required to show as to them.

Yet by this joint trial all the harrowing details of the robbery, including threats to the employees of the bank, the use of guns, the firing of shots at pursuing police, the devious plans for the robbery were admitted against this defendant by an instruction to the jury at the close of the government's case on the premise that this evidence went to his knowledge. (R. 1851).

Objections to this evidence were made throughout the trial and motions for severance and mistrial were repeatedly made and denied. Objection to the giving of the instruction was also made both before (R. 1794-1811) and after it was given (R. 1853).

The prejudice of the joinder is obvious. *Schaffer* v. *United States*, 362 U.S. 511 (1960).

Conclusion

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

GEORGE F. CALLAGHAN
Attorney for Petitioner.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969—SEPTEMBER SESSION, 1969

Nos. 17283, 17340

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM DADDANO, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 1, 1970

Before FAIRCHILD, CUMMINGS, *Circuit Judges,* and GRANT, *District Judge.*[1]

FAIRCHILD, Circuit Judge. These are appeals by five defendants from judgments entered upon guilty verdicts after a joint trial.

The evidence, when conflicts are resolved and permissible inferences drawn consistently with the verdicts, presents an unusual story, which we now, in outline, recount. The names of the present defendants are italicized.

[1] Chief Judge Grant of the Northern District of Indiana, is sitting by designation.

On September 17, 1963, Michael La Joy, his uncle, *Frank De Legge, Sr.*, Joseph D'Argento, and Larry Fletcher were driving home to Chicago from Detroit. They began to talk about robbing the Franklin Park Bank in Franklin Park, Illinois, where *De Legge, Sr.* lived. The plans for the venture were developed at several later conversations in various places. The robbery was carried out shortly before noon on September 23.

There were several additions to and defections from the group. La Joy, D'Argento, Gerald Tomaszek, and Guy Mendola entered the bank. Patrick Schang was the driver and remained in the stolen automobile in which the group reached and left the bank. They had just come from the home of *De Legge, Sr.*, on Manor Drive. *De Legge, Sr.* and *Frank De Legge, Jr.* had participated in the planning and had assisted in various preparations. *De Legge, Sr.* had suggested that after the robbery the group should go to a vacant house on Dora Street which he owned and which was for sale. The car could be driven into the attached garage and the robbers could leave, presumably without drawing attention to themselves.

At the time of the robbery, *De Legge, Sr.* remained in his car near the bank. He had agreed to attempt to collide with a police car if that became necessary to aid in the getaway. The robbery was timed so that a freight train would be passing on a track just north of the bank and forming a barrier between the bank and the Franklin Park police station, north of the track. *De Legge, Jr.* had agreed to, and did, make a telephone call to the police station before the train arrived. He gave false information concerning a bomb in a school farther north, hoping to decoy the police in that direction.

Unfortunately for the robbers, *De Legge, Jr.'s* telephone call was too late to be useful, virtually coinciding with the alarm from the bank. Squad cars were dispatched promptly. The train was shorter than expected, and by driving on the sidewalk the police were able to get around the caboose and give immediate chase. *De Legge, Sr.* failed to produce a collision.

Schang, the robbers' driver, was able, however, to lose his pursuers. He drove to the Dora street house and put the car in the garage. The men left the money, disguises and other equipment in the house, and departed on the run. Considerable commotion had been caused, however, by high speed, squealing tires, and flying gravel, and a series of mishaps, including the unforeseen presence of a garbage truck in the alley through which they drove. The men were seen by one or more neighbors. A short time later the police arrived, found the car, and searched the house.

There had been an interval, however, in which the *De Legges* had come to the house, hidden the discarded items, and removed the money. Questioned later, they apparently satisfied the police or FBI agents that they were not involved with the robbers nor the use by the latter of *De Legge Sr.'s* vacant house.

In some manner La Joy, D'Argento, Tomaszek, and Schang promptly became suspects. On September 26, these four were indicted. They were arrested, but freed on bail October 3. *De Legge, Sr.* had taken some of the bank money and paid it to *Rocco Montagna*, a professional bondsman, who arranged for the bonds. *De Legge, Sr.* told La Joy and D'Argento in *Montagna's* presence that the money had come from proceeds of the robbery.

A question arose why Mendola, who had been a participant, had not been indicted. Later Schang began to suspect that La Joy might have informed the police. Schang told *Montagna* of his suspicions. He was wary, however, because La Joy was the nephew of *William Daddano.* The evidence demonstrated that *Daddano* was one who spoke with a voice of authority in such matters. He is also *De Legge Sr.'s* brother-in-law and the uncle of both La Joy and *De Legge, Jr. Montagna* took Schang to *Daddano.*

Daddano decided that the participants would take lie detector tests, and that if anyone failed the test, the others could shoot him if they wished. Accordingly, in response to word from *Montagna,* La Joy, Schang, D'Argento, and Tomaczek met *Montagna* and *Daddano* at a bowling alley in the latter part of October. *Montagna* took the participants across the street to a motel. They went into a room one by one and were given a polygraph test by William Witsman. Witsman was then a detective in the Special Investigations Unit in the office of the sheriff of Cook county. The unit was headed by Chief Investigator *Richard Cain.* Witsman attached the apparatus to each man, asked and twice repeated a list of questions, recorded the answer, removed each man's chart from the machine and handed it to *Montagna.* One of the questions was whether the man had given truthful information to a law enforcement agency.

Montagna delivered the charts to *Daddano.* A day later, in *Daddano's* presence, *Montagna* told the men they had passed.

Witsman testified that *Cain* had given him a list of the questions, told him to go to the motel, to give the tests to men who would be produced by a man he would

meet there, not to interpret the charts, but to give them to the same man.

Some time later *Cain* directed Witsman to go to another address and administer similar tests to others. At the address was *Montagna's* home, and the men tested were the *De Legges* and *Mendola.* Months later Witsman was disturbed by a news story which contained Schang's picture and by recognizing Schang as one of the men he had tested. Witsman telephoned *Cain. Cain* said not to worry about the charts because he had flushed them down the toilet.

Although no witness except Witsman described *Cain's* participation, the jury could properly infer from the circumstances, as it did, that *Daddano* must have explained his problem to *Cain* and that *Cain* had arranged the tests and interpreted the charts with knowledge of the circumstances and their purpose.

La Joy, Schang, D'Argento, and Tomaszek were tried for the bank robbery in 1965 and convicted. Some of them had testified in their own behalaf, giving exculpatory and now admittedly perjured testimony. They received substantial sentences. La Joy, Schang, and D'Argento have been convicted of or charged with other offenses and face possible additional sentences. At various times in 1967 these three decided to give information to the government. Probably their cooperation with the government will help them, and they have much at stake. The government has given money to the families of La Joy and D'Argento in return for information received. In 1967 the indictment now under consideration was returned against the *De Legges, Montagna, Daddano,* and *Cain.* Mendola is deceased. The trial now under review occurred

in September, 1968, and La Joy, Schang, and D'Argento testified to many of the facts set forth in the foregoing narrative.

There can be no real challenge to the sufficiency of the evidence to support the facts just narrated. The story is, indeed, unusual. But the testimony was not inherently incredible. The jury was fully informed of the circumstances which bore upon the credibility of La Joy, D'Argento, and Schang, including their interests in recognition by the government of their cooperation, but the jury believed them. The jury also believed Witsman, and drew inferences as to *Cain's* guilty knowledge and intent which the jury was entitled to draw. We do not consider it necessary to set forth a detailed analysis of the supporting evidence.

We proceed to deal with the various attacks upon the indictment as matters of law, the claims that the facts narrated do not add up to guilt of the offenses charged, and claims of error in procedure and at trial.

Count 2 charged the *De Legges* with bank robbery[2] "together with" the other five participants. It further charged that they put lives in jeopardy by the use of dangerous weapons,[3] but the jury found them guilty only of the lesser offense. Counsel challenges the sufficiency of the evidence to support the verdict, apparently on the basis that what the *De Legges* did was short of "participation." *De Legge, Sr.'s* standing by in his car to protect

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[2] 18 U.S.C. §2113(a).

[3] 18 U.S.C. §2113(d).

the getaway, though he failed, and *De Legge, Jr.'s* telephone call to the police would qualify, it seems, as "participation", if that is meaningful and important, but the government proved other acts of aiding, abetting, and counselling the offense, making the *DeLegges* punishable as principals under 18 U.S.C. § 2 in any event.

1. *Challenges to the indictment.*

Counts 1 (conspiracy), 3 (accessory after the fact) and 4 (misprision of felony) charged *Daddano, Montagna,* and *Cain.* (Varelli, not on trial, was also charged in counts 1 and 4.)

Count 4[4] charged that defendants, having knowledge of the actual commission of the bank robbery by the seven participants, "concealed, and did not as soon as possible make known the same to some judge or other person in civil authority under the United States, . . . " After completing the charge in the words of the statute, the indictment specified that defendants caused lie detector tests to be administered in order to determine whether certain persons were furnishing information concerning the bank robbery and the perpetrators thereof to governmental authorities lawfully investigating the same.

Count 3[5] charged that defendants, knowing of the bank robbery by the seven participants, received, relieved, comforted, and assisted them in order to hinder and prevent their apprehension, trial and punishment. In addition to charging in the words of the statute, the indictment specified that the assistance for such purpose was given by causing the lie detector tests to be administered in order

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[4] Misprision of felony, 18 U.S.C. §4.

[5] Accessory after the fact, 18 U.S.C. §3.

to determine whether certain persons were furnishing information about the robbery and the participants to governmental authorities.

Count 1[6] charged defendants, in substance, with conspiring to commit the offenses charged in counts 3 and 4, in each case by means of the lie detector tests for the purposes described in those counts. Eight overt acts were alleged (and proved).

Defendants argue that misprision of felony is not sufficiently alleged unless a particular act of concealment is specified, and that the giving of lie detector tests to determine whether certain persons were furnishing information to the authorities is not an act of concealment.

Defendants rely upon *Bratton* v. *United States*[7] holding (1) that 18 U.S.C. §4, defining misprision, requires an affirmative act of concealment in addition to failure to disclose the felony to the authorities, and (2) that an indictment merely alleging concealment was insufficient. We agree with (1).[8] We agree, however, with a later decision in the tenth circuit, that an indictment simply using the words of the statute and alleging concealment and failure to make known is sufficient.[9] In any event, the giving of the lie detector test was an affirmative act, alleged in the indictment, and although the nexus between

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[6] Conspiracy, 18 U.S.C. §371.

[7] (10 Cir., 1934), 73 F2d 795.

[8] *Neal* v. *United States* (8th Cir., 1939), 102 F2d 643; see 21 Am. Jur. 2d Criminal Law §7, pp. 87-8.

[9] *Sullivan* v. *United States* (10th Cir., 1969), 411 F2d 556.

the determination of who was giving information to the authorities and the accomplishment of the concealment was not spelled out, it could readily be inferred.

At trial there was evidence which tended to prove that defendants intended that anyone found to have furnished information to the authorities would be silenced, and that the entire procedure and accompanying threats (even on the assumption the tests were only simulated and were not adequate for a qualified examiner to state an opinion) were intended to emphasize to all participants the desirability of withholding information from the authorities.

Of course, at the time the lie detector tests were given, the authorities had enough information about the participation of four men to have had them indicted. It has been held that it is unimportant whether the government did or did not know of the principal crime or who the perpetrator was before the person charged with misprision took affirmative steps to conceal the crime.[9a] Even if, however, suppression of testimony against the already indicted defendants would not constitute misprision, the felonies committed by the *De Legges* and Mendola had not yet become known to the authorities. The administration of the tests, in the aura of intimidation, concealed for the time being the felonies committed by the latter three, even though the fact of the robbery was well known and the participation of the other four sufficiently so.

Defendants contend that the misprision statute must not be applied to them because it would compel them to be witnesses against themselves. The theory is that if they

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[9a] *Lancey* v. *United States* (9th Cir., 1966), 356 F2d 407.

reported their information about the bank robbery as soon as they received it, they could reasonably fear that the information could lead to their own conviction of being accessories after the fact or some other related offense. This is particularly urged by *Montagna,* who knowingly received part of the stolen money. Defendants rely on *United States* v. *King*[10] which appear to support their claim, at least in dictum. We think the answer to this argument and, with all respect, to the holding of *King,* is that the offense of misprision as defined in 18 U.S.C. §4 consists of an act of concealment in addition to failure to disclose. Thus the statute does not purport to punish one solely for failure to report facts which he has reasonable fear might lead to his conviction of crime.

It appears that none of the bank robbery witnesses testified before the grand jury which returned the indictment in this case. Presumably the grand jury were apprised of what they knew by investigative reports of similar hearsay. Defendants note the second circuit criticism of this practice.[11] Part of the theory is that if a witness who testifies against a defendant at trial did not testify before the grand jury, there is no transcript of grand jury testimony to use in attempting impeachment. But the reasons for permitting use of prior testimony, if it exists, to impeach trial testimony do not, it seems to us, compel the creation of prior testimony so that it can be so used. The fifth amendment requirement of indictment

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[10] (9th Cir., 1968), 402 F2d 694.

[11] *United States* v. *Arcuri* (2d Cir., 1968), 405 F2d 691, 694, and cases cited therein.

by a grand jury is not violated where "all the evidence before the grand jury was in the nature of 'hearsay'."[12]

The *De Legges* are charged only in Count 2 and the other three in Counts 1, 3, and 4. All claim improper joinder of defendants.

Rule 8(b), F.R. Cr. P., authorizes joinder of two or more defendants if they are alleged to have participated in the same transaction or in the same series of transactions constituting offenses.

The robbery of the bank, and the set of events surrounding the lie detector tests are very closely related. The supposed need for the lie detector set of events grew out of the bank robbery. They were, in a sense, designed for the benefit and protection of the *De Legges* and other alleged robbers. They followed the robbery in a short period of time. In order to prove the offenses allegedly arising out of the lie detector events, it was essential to prove the bank robbery. It may be reasonable, for the purposes of Rule 8(b), to consider both sets of events as parts of one transaction. But even if each set of events be deemed a separate transaction, we think the relationship is close enough that they may be deemed a "series" under Rule 8(b). In either event the participants in one set of events may be joined as defendants with the participants in the other.

In *United States* v. *Scott*[13] this court held that three defendants could properly be joined in one indictment

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[12] *Costello* v. *United States* (1956), 350 U.S. 359, 363, 76 S.Ct. 406, 100 LEd 397; *United States* v. *Braico* (7th Cir., 1970), 422 F2d 543, 545.

[13] (7th Cir., 1969), 413 F2d 932.

charging three of them with one theft, two with a different theft, and one with a third. The three thefts were deemed a series of transactions under Rule 8(b) on the ground that they were part of a common plan. The pattern of events considered in *Scott* is different from the one at hand, and we do not consider the common plan test applied in *Scott* as exclusive. Rule 1.2 of the ABA Standards Relating to Joinder and Severance, quoted in part in *Scott*, not only permits joinder of defendants where the several offenses were part of a common scheme or plan, but also where they "were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others." (Rule 1.2(c)(ii).)

Precise, inelastic codification of the situations where joinder is reasonable and not unfair is extremely difficult. We think joinder was reasonable here.

Defendant also moved for severance under Rule 14, F.R. Cr. P., "Relief from Prejudicial Joinder". We find no abuse of discretion in the denial of their motions.

II. *Denial of Continuance because of pretrial publicity.*

Some of the defendants sought a continuance of transfer of this case because prejudicial publicity had occurred or was anticipated.

In 1963 when the bank robbery and lie detector events occurred, *Cain* was chief investigator of the Special Investigations Unit under the sheriff of Cook county. The present indictment was filed March 5, 1968, superseding an indictment filed against *Cain* later in 1967. The trial occurred in September, 1968. The 1968 campaign for

governor was under way, the election would be held in November, and one of the principal candidates for governor had been sheriff when *Cain* was chief investigator. Public comment was made from time to time during the campaign about *Cain's* indictment.

Defendants' argument was that these facts did and would increase the amount of publicity before and during trial, and that a continuance or transfer was required. The district court denied the motions.

Newspaper stories were placed in the record. We readily assumed that considerable publicity was and would be generated by a charge that an intermediary for bank robbers called on the sheriff's office for help in finding out which robber was squealing to the police; and that a highly placed enforcement officer arranged for lie detector tests to be given to assist in the inquiry. Political campaigners doubtless tried to use this material to advantage. Stories reporting the trial appeared daily.

But overall the quantity of publicity in the record is not impressive when the size of the metropolis is considered. The newspapers were very far from being saturated and nothing is shown with respect to other media.

The ultimate question is whether it is possible to select a fair and impartial jury, and in most situations the *voir dire* examination adequately supplies the facts upon which to base that determination.[14]

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[14] *Margoles* v. *United States* (7th Cir., 1969), 407 F2d 727; *Blumenfield* v. *United States* (8th Cir., 1960), 284 F2d 46, 51; *Jones* v. *Gasch* (D.C.Cir., 1967), 404 F2d 1231, 1239, cert. den. 396 U.S. 1029. But see Commentary ABA Standards Relating to Fair Trial and Free Press pp. 54-67, suggesting limitations on the effectiveness of *voir dire*.

When the jury was being selected here, only four prospective jurors indicated bias, one of them saying he could not keep an open mind because of exposure to publicity. All were excused. We are not persuaded that it was an abuse of discretion to proceed with the trial in Chicago in September.

III. *Publicity during trial.*

The jury was selected September 9 and 10, 1968. The trial began September 11 and the case submitted to the jury October 1. Until the latter date, the jury was permitted to separate.

On September 9, the trial judge explained to all the prospective jurors the necessity that a juror decide the case only upon the evidence presented in open court and avoid conversation and exposure to reports about the case. He ordered each one, even more broadly, "not to read any newspapers or any other journal, not to listen to the radio or to look at or listen to television programs". He meticulously repeated this order before each recess, so that on the 15 days on which the jurors were present, the order was given 46 times.

From time to time defense counsel brought newspaper stories to the attention of the judge, and requested that he question the jurors to determine whether any had read them and what prejudicial effect they may have had. The judge declined to do so, pointing to the order so explicitly and frequently given and relying upon the presumption that the order had not been violated.

More than 50 clippings from four Chicago newspapers are in the record. Some evidently appeared on the front page, many do not indicate the page, and many were on other pages. Only one full width headline appeared on the front page. It clearly did not go beyond the record.

In the main the stories reported the progress of the trial including claims made and evidence advanced by various defendants as well as the prosecution. Some of the stories, however, included material beyond the record, of which the jury should not be informed. There were several inaccurate statements which would have readily been recognized by the jury as mistakes. There were references to several of the defendants in terms indicating underworld or other criminal activity. The fact that Mendola was dead was known to the jury. Defense's cross-examination of one witness had suggested the witness may have been involved in Mendola's murder, but a number of the news stories described Mendola's death by shotgun and suggested that he had been killed because of his failure to pass the lie detector test. This did not appear in the heading of any story. Three stories on one day referred to government witness D'Argento's belief that his life was threatened by a Chicago organization, and the headings of these stories so reflected. They were not on the front page. D'Argento had testified on cross-examination that his life had been threatened, and although the judge struck the answer, the jury had heard it. It appeared that defense counsel who asked the question had reason to anticipate the answer.

There can be no question but that if it were shown that a juror had read the items going beyond the record, particularly those referring to Mendola's death and those calling the defendants gangsters and the like, further inquiry with respect to their effect upon him would be required.

The practice followed in this trial, occurring in September, 1968, clearly does not comply with the pronounce-

ment of this court several months later on March 4, 1969, in *Margoles* v. *United States*:[15]

> "Thus, the procedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, then the judge is not required to proceed further."

This court had not propounded a similarly comprehensive rule in earlier decisions.

The court's decision in 1962, reversing a conviction in *United States* v. *Accardo*[16] was based upon its "special facts", which are readily distinguishable from the present case. The *Accardo* trial lasted more than eight weeks, front page headlines carried prejudicial material and the trial judge gave his orders not to read about the trial only at the beginning of the selection of the jury. He declined, as here, to poll the jury when prejudicial publicity was brought to his attention.

Viewing the special fact of the instant case, tried before our pronouncement in *Margoles,* we think the trial judge could reasonably presume that jurors followed the orders so carefully and frequently given, and that they neither intentionally read the stories nor had prejudicial material forced upon them.

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[15] (7th Cir., 1969), 407 F2d 727, 735.

[16] 298 F2d 33.

We acknowledge that shortly after the decision in *Margoles,* this court reversed a pre-*Margoles* conviction in *United States* v. *Palermo.*[17] There the same trial judge had given similar careful and frequent admonitions. It was held, however, that such admonitions could not be relied upon where prejudicial publicity was brought to his attention, and that he must question the jury to ascertain whether any had read or heard it. That was said, however, in a case where, although the opinion does not detail it, headlines would virtually force the prejudicial material on a juror attempting to avoid it. We do not deem it controlling here. Cf *United States* v. *Solomon* (7th Cir., 1970) 422 F.2d 1110, 1118-1119, cert. denied *sub nom. Sommer* v. *United States,* 399 U.S. 911.

IV. *Restriction of cross-examination.*

La Joy, D'Argento, and Schang were extensively cross-examined. In each case defense counsel brought out many facts which might damage credibility: convictions of crimes, pendency of outstanding charges, perjury in other trials, exposure to long sentences, hope for leniency from the government, refusal to talk with defense counsel, payment of money by the government to the wives of La Joy and D'Argento in return for information supplied by the husbands.

Defense counsel claim error under *Alford* v. *United States*[18] and *Smith* v. *Illinois.*[19] La Joy testified he was

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[17] (7th Cir., 1969), 410 F2d 468, 471.

[18] (1931), 282 U.S. 687.

[19] (1968), 390 U.S. 129.

serving his sentence and in the custody of the marshal, but that he was no longer in the penitentiary. The court sustained objections to questions seeking to learn where he was then living. Schang testified that after a period in jail he had been released on bond and was still allowed to be free on bond. He testified that he is employed. Objections were sustained to questions as to the identity of his employment and where he was living.

We think that although the particular questions are literally the kind with which *Alford* and *Smith* deal, defense counsel had nevertheless been afforded "the opportunity to place the witness in his proper setting". Under the circumstances the trial judge did not abuse his discretion. The harassment or danger to which an answer would probably expose Schang, at least, was implicit in the situation and in view of the admissions already before the jury it is hard to imagine that the answers would have added or led to any significant material bearing upon the credibility of the witnesses.

Other claims of undue restriction on cross-examination relate to situations where counsel brought before the jury much of the substance of what he wanted to show. Each claim ultimately collides with either the proposition that the court did not abuse his discretion in stopping inquiry where he did, or that if there was error, it was harmless.

V. *Other claims.* Numerous other arguments are advanced, including allegedly undue limitation of argument by defense counsel and allegedly unrestrained excesses in argument by the government. *Cain* argues several other points, including the proposition that his subpoenas requiring the IRS to produce income tax returns of government witnesses should have not been quashed.

We have examined all these arguments and are satisfied that no reversible error has been shown.

VI. *Daddano's challenge to his consecutive sentences.*

Daddano was sentenced to five years on count 1, seven years on count 2, and three years on count 4. The terms are consecutive and cumulative fines were imposed. He argues that these are all sentences for the same act of giving a lie detector test and are illegal.

It is well settled that consecutive and cumulative penalties may be imposed for separate offenses. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."[20]

It is readily apparent that the offense of conspiracy is distinct from the other two, since it must be proved that two or more conspired, but need not to be proved that a substantive offense was completed.

Whether misprision and being an accessory after the fact are distinct from each other seems a closer question. Probably most instances of misprision involve, in actuality, being an accessory after the fact. Comparing the statutes literally, however, 18 U.S.C. §3 (accessory after the fact) requires a purposeful relationship between the

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[20] *Blockburger* v. *United States* (1932), 284 U.S. 299, 304; *United States* v. *Nobel* (3rd Cir., 1946), 155 F2d 315, 318; *Newman* v. *United States* (6th Cir., 1954), 212 F2d 450; *Gore* v. *United States* (D.C.Cir., 1957), 244 F2d 763; *Dear Wing Jung* v. *United States* (9th Cir., 1962), 321 F2d 73, 75; *United States* v. *Barnett* (6th Cir., 1969), 418 F2d 309, 312.

acts of the accessory and the principal offender. The accessory must receive, relieve, comfort or assist the principal offender in order to hinder or prevent his apprehension, trial or punishment. 18 U.S.C. §4 (misprision) requires concealment of the commission of the felony, a fact not necessarily required by §3, but does not require an intent to benefit the principal offender, although such benefit usually results. We conclude the offenses are distinct for the purpose of imposing cumulative penalties.

The judgments appealed from are affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, December 2, 1970

Before

HON. THOMAS E. FAIRCHILD, *Circuit Judge*

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. ROBERT A. GRANT, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17283 vs.

WILLIAM DADDANO, et al.,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17340 vs.

RICHARD CAIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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On consideration of the separate petitions for rehearing en banc filed herein by the defendants-appellants, William Daddano, Richard Cain, Rocco Montagna and Frank De Legge, Sr.; no judge in regular service nor member of the panel having requested a vote thereon.

IT IS ORDERED that each of the above petitions for rehearing en banc be and the same are hereby denied.